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In the Supreme Court
of the
United States

OCTOBER TERM, 1938.

No. 342

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES, CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, A CORPORATION, PETITIONERS,

VS.

SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, A CORPORATION, RESPONDENT.

PETITIONERS' REPLY BRIEF.

SUPPLEMENTAL STATEMENT.

This reply brief is respectfully submitted by way of answer to the contention of respondent made for the first time in its brief lately filed, that the installation of grain doors was not a transportation service under the Interstate Commerce Act. The trial court and the Circuit Court of Appeals both proceed upon the theory

that it was a transportation service, and the brief of respondent in opposition to the writ, and indeed, the better part of the present brief also so assume.

Respondent argues in its Statement (pp. 3-7) that there was no prior arrangement under the governing tariff. That is a question of law under the Interstate Commerce Act and a principal point in controversy, and has no place in the respondent's statement.

ARGUMENT.

Summary of the Argument.

Point I.

Respondent is in error in contending that the installation of grain doors by the carrier at the shipper's request was not a carrier's service, subject to the Interstate Commerce Act and the governing tariff; but that the carrier and shipper were in such case free to bargain "as ordinary individuals and subject to the usual rules applicable to the making of contracts."

A. For the reason that this service is a transportation service under 49 U. S. C. A., Sec. 1 (3) within the jurisdiction of the Interstate Commerce Commission; and every shipper must be treated alike. Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30.

B. For the reason that the governing tariff gives a shipper an election to perform the installation service himself; or to request the carrier to do it, as respondent has done, and to pay the uniform tariff charge for the service so performed by the carrier, which respondent has not done. Cleveland & St. Louis Ry. v. Dettlebach, 239 U. S. 588, 593-4, 36 S. Ct. 177, 180.

Point II.

Respondent is in error in contending that this tariff provision for prior arrangements must be construed strictly in favor of respondent.

A. For the reason that tariffs are construed in the light of the Interstate Commerce Act, and will be given that interpretation, if possible, which will comply with the Act and not result in a violation thereof. Great

Northern Ry. Co. v. Delmar Co., 283 U. S. 686, 690-1, 51 S. Ct. 579, 581.

B. For the reason that tariffs are not construed strictly or to the letter regardless of effect, but are given a reasonable construction to give effect to their practical purpose. Menasha Paper Co. v. C. & N. W. Ry. Co., 241 U. S. 55, 62-3, 36 S. Ct. 501, 504, 505.

Point I.

Respondent is in error in contending that the installation of grain doors by the carrier at the shipper's request was not a carrier's service, subject to the Interstate Commerce Act and the governing tariff; but that the carrier and shipper were in such case free to bargain "as ordinary individuals and subject to the usual rules applicable to the making of contracts."

A. For the reason that this service is a transportation service under 49 U. S. C. A., Sec. 1 (3) within the jurisdiction of the Interstate Commerce Commission; and every shipper must be treated alike. Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 47, 50, 36 S. Ct. 228, 229-30.

(This contention appears in respondent's brief, pp. 17, 12, 14, 16-20).

The governing tariff was intended to regulate, with that fundamental uniformity required by the Act, the installation of grain doors in cars furnished to transport grain in interstate commerce. Section 1 (3), 49 U. S. C. A. of the Act (Act of February 28, 1920, c. 91, 41 Stat. 474, Sec. 400 (3)) in the definition of "Transportation," plainly gives the Interstate Commerce Commission jurisdiction to regulate this service; for that section reads as follows:

> "The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

This Court, in the case of *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 47, 50; 36 S. Ct. 228, 229-30, expressly holds that the service of installing grain doors by a carrier for a shipper is a transportation service, subject to the administrative jurisdiction of the Interstate Commerce Commission.

The Commission has in the instant case expressly held installing grain doors to be a carrier's service under the tariff when requested by the shipper (R. 52, 60).

B. For the reason that the governing tariff gives a shipper an election to perform the installation service himself; or to request the carrier to do it, as respondent has done, and to pay the uniform tariff charge for the service so performed by the carrier, which respondent has not done. Cleveland & St. Louis Ry. v. Dettlebach, 239 U. S. 588, 593-4, 36 S. Ct. 177, 180.

The purpose of this tariff is manifestly to permit the shipper to install the grain doors at his own expense, as a shipper's service, or to ask the carrier to do it for him for a reasonable charge, as a carrier's service. Not only does the plain language of the tariff bear this out, but the Interstate Commerce Commission has so held in upholding its validity (R. 60, 61, 63). When the carrier is requested to perform the service, the carrier is performing a transportation service, a carrier's serv-

ice for the shipper. The tariff authorizes and requires the carrier to render this service, when a shipper requests it. Therefore, the governing tariff read in the light of the Interstate Commerce Act governs the rights and liabilities of the carrier and shipper.

If respondent is correct in its contention that performing this service for the shipper at a tariff rate is different from hauling the shipper's goods at a tariff rate, then the carrier can bargain with each shipper, free to give rebates and make discriminations, in installing grain doors.

Such is not the law and is inconsistent with respondent's position before the Commission (p. 8 respondent's brief) and in the trial of this case (p. 7 respondent's brief).

This Court, in the case of *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, 593-4, 36 S. Ct. 177, 180, holds that while warehousing is not a carrier service at common law, it has been made so by the Act, to prevent rebates and discriminations between shippers; and that where a shipper requests this warehousing service (instead of taking the goods away and doing his own warehousing), the shipper must pay the tariff charge and abide by a limitation of liability approved by the tariff. This Court, speaking through Mr. Justice Pitney, declared, pp. 593-5:

> "And this is quite in line with the letter and policy of the Commerce Act, and especially of the amendment of June 29, 1906, known as the Hepburn Act (34 Stat. 584, c. 3591), which enlarged the definition of the term 'transportation,' (this, under the original act, included merely 'all instruments of

shipment or carriage') so as to include 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof *and all services in connection with* the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, *storage*, and hauling *of property transported;* and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish *such transportation* upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. All charges made for *any service rendered or to be rendered in the transporation* of passengers or property *as aforesaid, or in connection therewith,* shall be just and reasonable; and every unjust and unreasonable charge *for such service or any part thereof* is prohibited and declared to be unlawful.'

From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like. The recommendation of the Interstate Commerce Commission for the adoption of the uniform bill of lading was of course made in view of this legislation, and while not intended to be and not in law binding upon the carriers, it is entitled to some weight. It recognizes—whether correctly or not, is a question not now presented—the right of the carrier to make a charge, the amount of which has not been definitely fixed in advance, for storage as warehouseman in

addition to the charge for transportation; but at the same time it recognizes that a valuation lower than the actual value may be agreed upon between the shipper and the carrier, or determined by the classification or tariffs upon which the rate is based; and it is a necessary corollary that what should be a reasonable charge for storage would be determined in the light of all the circumstances, including the valuation placed upon the goods."

Point II.

Respondent is in error in contending that this tariff provision for prior arrangements must be construed strictly in favor of respondent.

This contention appears in respondent's brief, pp. 12-13, 28-33).

No case respondent cites sustains this proposition; whereas the cases of Great Northern Ry. Co. v. *Delmar Co.*, 283 U. S. 686, 690-1, 51 S. Ct. 579, 581, and *Menasha Paper Co.* v. *C. & N. W. Ry. Co.*, 241 U. S. 55, 62-3; 36 S. Ct. 501, 504, 505, are directly contrary to it.

A. For the reason that tariffs are construed in the light of the Interstate Commerce Act, and will be given that interpretation, if possible, which will comply with the Act and not result in a violation thereof. Great Northern Ry. Co. v. Delmar Co., 283 U. S. 686, 690-1, 51 S. Ct. 579, 581.

If respondent is correct it could enjoy free the service that other shippers (R. 56, 62, 65) have to pay for, although it was respondent's own fault if the arrangements made lacked any desirable perfection. The effect of the decision below in this case here on review, is to place it in the power of respondent to defeat the tariff charge at its pleasure, and to accomplish indirectly what

cannot be accomplished directly, even by agreement. Departure from the published tariffs, which are given the force of Statutes, is *per se* a discrimination in violation of the Act. That is the statutory basis for a suit for undercharges. (Point A, Petitioners' Brief).

If tariffs are to be strictly construed, it is to prevent discrimination in violation of the Act, as for a special service to a shipper not provided for in the tariffs. *Davis* v. *Cornwell,* 264 U. S. 560 (p. 31 respondent's brief). The other cases cited by respondent present situations where a carrier or *shipper is denied recovery,* because of *its own* failure to comply with a tariff. *Davis* v. *Henderson,* 266 U. S. 92 is such a case.

The *Delmar* case is quoted on p. 27 of Petitioners' Brief, to show that this tariff should be construed to avoid such a discriminatory result in violation of the Act.

B. For the reason that tariffs are not construed strictly or to the letter regardless of effect, but are given a reasonable construction to give effect to their practical purpose. Menasha Paper Co. v. C. & N. W. Ry. Co., 241 U. S. 55, 62-3, 36 S. Ct. 501, 504, 505.

This Court held in the *Menasha* case that a failure on the part of the carrier to put all the cars awaiting delivery on consignee's siding that there was physically room for, as *strictly* required by the demurrage tariff (which stated the siding must be "full"), did not prevent the accrual of the demurrage charges. The carrier had in fact complied with the other requirements of the demurrage tariff by giving written notice of the arrival and description of the cars, and had put all the cars on the siding that consignee could actually handle. The

consignee contended the tariff had to be strictly construed to defeat the charge. But this Court declared, speaking through Mr. Justice McKenna, on pages 62, 63:

> "It is somewhat difficult to state succinctly the argument of counsel by which he attempted to give pertinency to the contention based on these rules. We have seen that the sidetrack of the paper company could accommodate about seven cars, but as the company used the track it could handle only two or three cars a day and hence it did not ask for more. The Supreme Court of the State, therefore, decided that the railway company had complied with its obligation to the paper company by complying with such demand and was entitled to charge for demurrage. And answering the contention of the paper company (repeated here), the court said the railway 'was not obliged to do a vain and useless thing by putting seven cars upon the track at one time and thus prevent the practical handling or unloading of any cars thereon by appellant (paper company) contrary to its orders.' The court, by such holding, counsel says, decided that 'the rules must have a reasonable construction.' And, further, 'This is the crux of the decision and it is absolutely in opposition to all of the decisions of the Interstate Commerce Commission and of the courts and of the spirit and intent of the Act to Regulate Commerce.' In other words, counsel insists that there should have been an actual filling of the tracks even though this would have prevented their use and have been contrary to the directions of the company, *the basis of the contention being 'that the rules must be strictly construed and that there must be "definite tariff authority" for the charges made.'* And the conclusion, it is asserted, is supported by all authorities, judicial, administrative and legislative. Rigorously applying the test that the exact letter of the statute must be observed, counsel goes so far as to assert that there was an imperative duty upon the railway company to so fill the tracks, and this without orders. * * *

We are unable to concur in counsel's construction of the rules or to hold that it has any such formidable support as he assigns to it. And we content ourselves with the bare assertion, not even pausing to review counsel's chief reliance, that is, *United States* v. *Denver & Rio Grande R. R.*, 18 I. C. C. 7. The case has not the breadth given to it. If it had we should be unable to follow it."

This case represents the established view of this Court. (Petitioners' Brief, Point B, pp. 19-20 and Point C, pp. 21-22).

Conclusion.

It is respectfully submitted that respondent's contentions in its brief are not the law and cannot defeat the tariff charge for a tariff service rendered at its request; and therefore this Court should reverse the judgment below and direct the recovery of the lawful tariff charges due in the sum of $374.40, by Petitioners from Respondent, in conformity with the order of the Interstate Commerce Commission.

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